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The Domagala Dilemma-Domagala v. Rolland

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Abstract
In Domagala v. Rolland, the Minnesota Supreme Court granted review in a personal injury case that was dominated by duty and special relationship issues, even though the parties agreed that there was no special relationship between them. The case, straddling the misfeasance/nonfeasance line, was complicated by the defense theory (that the lack of a special relationship meant that the defendant owed no duty to protect or warn the plaintiff), and the plaintiff's theory (that the defendant owed a duty of reasonable care to the plaintiff because he acted affirmatively, even if the risk to the plaintiff did not become apparent until later). At trial, the result was a set of conflicting and inconsistent jury instructions that in effect permitted Domagala to prove that Rolland was negligent, except not by either failing to warn or protect Domagala. The result was a defense verdict. Domagala appealed.

The court of appeals rejected the defense's theory, accepted the plaintiff's, and remanded the case for a new trial. The supreme court rejected both theories, concluding that a duty existed because the defendant affirmatively created a foreseeable risk of injury to the plaintiff, and affirmed the court of appeals's decision to remand the case for a new trial.

This article takes a close look at Domagala. It sets out the facts, the jury instructions given by the district court, and the dilemma the instructions created for Domagala in trying to prove that Rolland was negligent without establishing that Rolland should have warned or protected him. An analysis of the court of appeals and supreme court opinions follows, including the lessons from,and questions and red flags raised by, the supreme court's opinion. The last part is a simple conclusion.

Keywords
negligence, duty, foreseeable risk, duty to warn, special relationship

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THE *DOMAGALA* DILEMMA– *DOMAGALA V. ROLLAND*

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Duty is not an issue in most negligence cases. If the defendant creates a foreseeable risk of injury, the defendant owes a duty of reasonable care with respect to persons or property placed at risk because of that conduct. On occasion, typically where an accident occurs in an unusual manner, there may be an argument over whether an injury is unforeseeable as a matter of law.[1] Sometimes policy considerations will counsel against the imposition of a duty, even if the injury is foreseeable.[2]

The duty issue also becomes problematic if the defendant created a risk of injury, even if not negligently, that later resulted in foreseeable risk, or if the defendant did not act at all. In those

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1. *See, e.g.*, Foss v. Kincade, 766 N.W.2d 317, 322–23 (Minn. 2009) (holding that injury to a child climbing on a bookcase at a house where he and his mother were visiting was unforeseeable as a matter of law).

2. *See* Stadler v. Cross, 295 N.W.2d 552, 555 (Minn. 1980) (adhering to the zone of danger rule in negligent infliction of emotional distress cases).

cases the defendant owes no duty to the plaintiff unless the plaintiff establishes an exception to the general no duty rule.[3]

Nonfeasance cases often arise in the context of a defendant's failure to use reasonable care to protect the plaintiff from risks, which are sometimes created by a third person, but not always. A defendant may have a duty to act for the protection of the plaintiff, including warning the plaintiff of potential risks of injury, if there is a special relationship between the plaintiff and defendant (or, in the case of injury caused by a third person, between the defendant and the third person) and the risk of injury is foreseeable.[4]

In *Domagala v. Rolland*,[5] the Minnesota Supreme Court granted review in a personal injury case that was dominated by duty and special relationship issues, even though the parties agreed that there was no special relationship between them. The case, straddling the misfeasance/nonfeasance line, was complicated by the defense theory (that the lack of a special relationship meant that the defendant owed no duty to protect or warn the plaintiff), and the plaintiff's theory (that the defendant owed a duty of reasonable care to the plaintiff because he acted affirmatively, even if the risk to the plaintiff did not become apparent until later). At trial, the result was a set of conflicting and inconsistent jury instructions that in effect permitted Domagala to prove that Rolland was negligent, except not by either failing to warn or protect Domagala. The result was a defense verdict. Domagala appealed.

The court of appeals rejected the defense's theory, accepted the plaintiff's, and remanded the case for a new trial. The supreme court rejected both theories, concluding that a duty existed because the defendant affirmatively created a foreseeable risk of injury to the plaintiff, and affirmed the court of appeals's decision to remand the case for a new trial.

This article takes a close look at *Domagala*. It sets out the facts, the jury instructions given by the district court, and the dilemma the instructions created for Domagala in trying to prove that Rolland was negligent without establishing that Rolland should have warned or protected him. An analysis of the court of appeals and supreme court opinions follows, including the lessons from,

3. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 (2010).

4. *See id.* §§ 40–41.

5. 805 N.W.2d 14 (Minn. 2011).

and questions and red flags raised by, the supreme court's opinion. The last part is a simple conclusion.

I. THE FACTS

Domagala was injured when a bucket attachment on a skid loader operated by Rolland fell on his left foot crushing three of his toes, which were eventually amputated. Domagala, who was married to Rolland's cousin, engaged Rolland to do some landscaping work on his property. Rolland did not charge Domagala for the work, which included finishing the grading on his yard. Rolland, with eight years of experience operating a skid loader, brought his skid loader to do the work. Domagala had no experience with skid loaders, so while Rolland did the grading work, Domagala picked up rocks and debris around the yard. The skid loader was noisy, so the two communicated through hand signals. If Domagala needed to speak with Rolland he would approach the skid loader with his hands raised and Rolland would do the same to show that he was not touching the controls. Rolland brought three attachments to do the work. Switching the attachments was somewhat difficult, as it involved releasing the pins holding the attachments with two release levers, which sometimes became jammed with debris. When one lever was jammed, Rolland would manipulate the hydraulics to shake the debris loose from the other pin. It was an admittedly dangerous operation.

On the day of the accident, Rolland was shaking a bucket attachment to dislodge the debris that was jamming one of the levers when Domagala approached the skid loader with his hands raised. Rolland raised his hands in response and then without any further communication, Domagala removed the rock that was jamming the pin. Domagala then released the jammed lever and the bucket fell on his left foot. Domagala brought suit against Rolland.

At the outset, the case seemed to be simple enough. The defendant created a foreseeable risk of injury to the plaintiff in the mode he was using to change the skid loader attachments and therefore owed the defendant a duty of reasonable care, including a duty to warn of or otherwise protect the plaintiff from the risks of coming into close proximity to the skid loader. That was the plaintiff's theory of the case from the outset.[6]

6. Brief for Respondent at 1, *Domagala*, 805 N.W.2d 14 (No. A09-1945),

II. THE JURY INSTRUCTIONS

Had the district court determined that Domagala owed a duty of reasonable care to Rolland, instructed the jury using the pattern jury instruction on negligence,[7] which would have applied to both Domagala and Rolland, and submitted special verdict questions covering Rolland's and Domagala's negligence, the case would have been relatively uncomplicated—at least in terms of the legal standards, if not the facts.

That was not what happened, however. The defendant's theory from the outset was that there was no duty to warn or protect the plaintiff in absence of a special relationship between the defendant and plaintiff. To drive home the point, Rolland requested two jury instructions implementing the theory.

The first instruction, focusing on the impact of a lack of a special relationship between the plaintiff and defendant, advised the jury that the defendant had no duty to protect the plaintiff:

> *No Duty to Protect*
>
> A person generally has no duty to act for the protection of another person. A legal duty to protect will be found to exist only if there is a special relationship between the parties and the risk is foreseeable. The Court has ruled, as a matter of law, that no duty to protect exists in this matter and you must not consider such a duty in your deliberation in this case.[8]

The second instruction told the jury that special relationships giving rise to a duty to warn arise in only limited cases, and that the lack of a special relationship meant that the defendant owed no duty to warn the plaintiff:

> *No Duty to Warn*
>
> A special relationship giving rise to a duty to warn is only found on the part of common carriers, innkeepers, possessors of land who hold it open to the public, and persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. The Court has ruled, as a matter of law, that no duty to warn exists in this

2011 WL 7415264, at *1.

7. *See* 4 Michael K. Steenson & Peter B. Knapp, MINNESOTA PRACTICE: JURY INSTRUCTION GUIDES - CIVIL, § 25.10 (5th ed. 2006).

8. *Domagala*, 805 N.W.2d at 20.

> matter and you must not consider such a duty in your deliberation in this case.[9]

The district court also gave the plaintiff's requested instruction that mirrored the language of section 321 of the Restatement (Second) of Torts[10]:

> *Duty of Care Based on the Creation of a Dangerous Situation*
>
> If a person created an unreasonable risk of causing physical harm to another, that person has a duty to exercise reasonable care to prevent the risk from taking effect. This duty applies, even though at the time of the creation of the unreasonable risk, the person had no reason to believe that it would involve such a risk.[11]

The district court also gave the pattern jury instruction on reasonable care.[12]

The first two instructions told the jury that because there was no special relationship between Domagala and Rolland, Rolland had no duty to protect Rolland or warn him of the risk in detaching the bucket. The third told the jury that Rolland owed the plaintiff a duty to use reasonable care to prevent a risk from taking effect, even if Rolland was not negligent in creating the risk in the first place. The district court found Domagala's attempt in closing argument to explain special relationships to be objectionable and reread the instructions, save for the no-duty-to-protect instruction.[13] The jury, confused by the instructions, asked the district court for clarification on the duty-to-warn instruction,

9. *Id.*

10. *See* RESTATEMENT (SECOND) OF TORTS § 321 (1965).

11. *Domagala*, 805 N.W.2d at 20.

12. *Id.* at 20–21; *see also* 4 STEENSON & KNAPP, *supra* note 7, § 25.10. The negligence instruction reads in pertinent part as follows:

> *Definition of "reasonable care"*
>
> Reasonable care is the care a reasonable person would use in the same or similar circumstances.
>
> *Definition of "negligence"*
>
> Negligence is the failure to use reasonable care. Ask yourself what a reasonable person would have done in these circumstances. Negligence occurs when a person:
>
> 1. Does something a reasonable person would not do; or
> 2. Fails to do something a reasonable person would do.

13. During closing arguments, Domagala focused on what a reasonable person would have done under the circumstances. He also attempted to explain the source of language in the instructions by explaining special relationships in negligence law. The district court found the argument objectionable and reread all the instructions except the no-duty-to-protect instruction. *Domagala*, 805 N.W.2d at 21.

but the court told the jury to rely on the instructions as given.[14] The jury found for the defendant.[15]

III. *DOMAGALA*'S DILEMMA

In light of the instructions, Domagala's dilemma was to convince the jury that the defendant was negligent in the failure to exercise reasonable care for his protection, but without being able to show that Rolland either failed to warn him or to protect him (had the jury followed the district court's rereading of the instructions exactly, it could have found negligence in the failure to protect, although how Rolland might have done that without warning Domagala obviously has its problems). On appeal, both the court of appeals and supreme court struggled with the consequences of the dilemma, which—more sharply defined—is whether a defendant who is not in a special relationship with the plaintiff may nonetheless owe a duty to the plaintiff to warn of risks created by the defendant or to take other precautions for the plaintiff's safety.

The origin of the dilemma was a flawed syllogism advanced by Rolland and accepted in part by the district court. This is the argument:

(1) A defendant who is in a special relationship with a plaintiff has a duty to warn or protect the plaintiff.
(2) Rolland and Domagala were not in a special relationship.
(3) Rolland therefore owed no duty to Domagala to warn or protect him.

The first premise is an accurate statement of the law, but it is incomplete. The second premise is accurate. The conclusion is not accurate, because the first premise is an incomplete statement of the law. To be accurate, the first premise would have to state that a defendant who is in a special relationship with a plaintiff has a duty to warn or protect the plaintiff, but a defendant who affirmatively creates a risk of injury to the plaintiff owes a duty to the plaintiff to warn or protect the plaintiff from the risk of injury.

The key issue facing the Minnesota Court of Appeals and Minnesota Supreme Court was the validity of the conclusion that

14. During deliberations, the jury asked the trial judge if "no duty to warn" meant "that the defendant had no obligation to try to keep the plaintiff away from the skid loader?" The trial judge replied: "I cannot give you further instruction on this. Please rely on the jury instructions provided to you." *Id.*

15. *Id.*

Rolland owed no duty to Domagala because of the lack of a special relationship between them. Both courts rejected the notion that lack of a special relationship should be preemptive on the duty issue, although on slightly different grounds. The following issues were, if Rolland owed a duty to Domagala absent a special relationship, what the basis was for the duty; if there was a duty, whether the duty of reasonable care could include a duty to warn; and finally, whether the jury instructions were sufficiently prejudicial to require reversal.

IV. *DOMAGALA* IN THE MINNESOTA COURT OF APPEALS

The court of appeals concluded that there was no special relationship between the parties, which remained an uncontested point.[16] In an attempt to circumvent the dilemma, Domagala argued that Rolland had a duty to warn based on a products liability analogy, because Rolland effectively created a "dangerous product" when he permitted the bucket to hang by a single pin.[17] The court of appeals rejected the theory because Domagala was obviously not a product seller or distributor.[18]

Domagala argued that the case was *analogous* to a products liability case, not that it *was* a products liability case. Products liability cases, more broadly, could simply be viewed as just one category of cases in which a class of defendants (product sellers) could be held liable for creating a risk of injury to product users and failing to warn users of the risk.[19] Products liability cases are really just negligence cases, after all,[20] and if there is a duty to warn in products liability cases, there should be a duty to warn in Domagala's case. It was easier to reject the argument and potential muddling of products liability theory based upon the fact that Rolland was not a product seller, rather than dealing with the broader suggestion that this case was just an example of a defendant creating a risk of injury, which triggers a duty to exercise reasonable care. The court of appeals ultimately ended up finding a duty anyway, even after rejecting the products liability analogy.

16. Domagala v. Rolland, 787 N.W.2d 662, 668 (Minn. Ct. App. 2010).
17. *Id.* at 668–69.
18. *Id.* at 669.
19. *See id.*
20. *See, e.g.*, Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922, 926 n.4 (Minn. 1986) (warning claims); Bilotta v. Kelley Co., 346 N.W.2d 616, 622 (Minn. 1984) (design defect claims).

The court of appeals affirmed the district court's ruling on the special relationship issue because Domagala did not identify a special relationship between the parties and because Rolland did not have a duty to warn under products liability principles. But there was more. Domagala argued that the no-duty-to-warn and no-duty-to-protect instructions were inappropriate because the use of negative jury instructions is not appropriate, the use of generalized instructions is preferred to specific instructions, and the instructions unduly emphasized Rolland's case and were confusing to the jury.[21]

The court of appeals recognized the inconsistency in the law concerning the use of general versus special instructions and also that there are no standardized instructions on no-duty-to-warn or protect.[22] The court concluded that because of the broad discretion district courts have in instructing juries, the no-duty-to-warn and no-duty-to-protect instructions were not an abuse of the district court's discretion as Rolland, in fact, did not owe Domagala a specific duty to warn or protect him.[23] The court also concluded that, because the jury instructions did not misstate the law, it was not an abuse of the district court's discretion to frame the instructions in the negative.[24]

Having resolved those issues in favor of Rolland, largely based on the obvious necessity of giving district courts latitude in framing jury instructions,[25] the court of appeals considered whether the instructions, as a whole, misstated or confused an applicable principle of law.[26] The court agreed with Domagala's argument that "the jury instructions were self-conflicting, overemphasized respondent's legal theory, and gave the jury an erroneous impression of the law."[27] The court of appeals arrived at that conclusion because Rolland owed Domagala "a general duty to exercise reasonable care and a duty to exercise reasonable care to prevent harm to [Domagala] when [Rolland] created an admittedly dangerous situation."[28]

21. *Domagala*, 787 N.W.2d at 670.
22. *Id.*
23. *Id.*
24. *Id.* at 671.
25. *Id.* at 670.
26. *Id.* at 671.
27. *Id.*
28. *Id.* at 672.

The court initially relied on section 321 of the Restatement (Second) of Torts to support its conclusion that "[t]he exercise of reasonable care upon the creation of a dangerous situation may include giving a warning to anyone placed at risk."[29] Section 321 of the Second Restatement reads as follows:

> (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.
>
> (2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.[30]

The court cited comment a to section 321, which states that subsection (1) "applies whenever the actor realizes or should realize that his act has created a condition which involves an unreasonable risk of harm to another, or is leading to consequences which involve such a risk."[31] The Restatement includes several illustrations of the application of section 321. In the first:

> A is playing golf. He sees no one on or near a putting green and drives to it. While the ball is in the air, B, another player, suddenly appears from a bunker directly in the line of A's drive. A is under a duty to shout a warning to B.[32]

In the illustration, the golfer creating the risk was unaware at the time that his action created a risk of injury, but upon realizing that it did, he had a duty to warn B. After noting the illustration, the court of appeals then sandwiched in a statement that the no-duty-to-warn instruction—coupled with the obligation to use reasonable care upon discovery of a dangerous condition—confused the jury,[33] before stating that it would use the framework of the supreme court's decision in *Zylka v. Leikvoll*[34] to analyze the duty-to-warn issue.

29. *Id.*
30. RESTATEMENT (SECOND) OF TORTS § 321 (1965).
31. *Domagala*, 787 N.W.2d at 672 (quoting RESTATEMENT (SECOND) OF TORTS § 321 cmt. a (1965)).
32. RESTATEMENT (SECOND) OF TORTS § 321 cmt. a, illus. 1 (1965).
33. *Domagala*, 787 N.W.2d at 672.
34. 274 Minn. 435, 144 N.W.2d 358 (1966).

Zylka was a factually complicated case in which a tow truck operator (Leikvoll) created a risk of injury, although not negligently, but subsequently was negligent in failing to adequately warn of the risk created by the dangerous situation. The tow truck operator created a dangerous situation as to the second collision under the law of the case.[35] The district court in the case instructed the jury:

> If a person creates or participates in creating a dangerous situation on a highway, he is under a common law duty to use reasonable care to remove or correct the situation to the extent that that is reasonably feasible or possible, and to use reasonable care to warn others of the danger while the danger exists.[36]

The supreme court stated in *Zylka*:

> We believe, and find support for the proposition, that one's participation in the creation of a hazard need not be negligent for the duty of care to arise. Though not negligent, it is clear that Leikvoll was a participant in the creation of the first accident when, in performing a contract to start [the] car, the latter became involved in a collision. A duty then fell upon Leikvoll, not as a volunteer but as one called upon to exercise reasonable care, either to remove the hazard or give adequate warning to others.[37]

The court of appeals in *Domagala* applied the *Zylka* framework, concluding:

> [A]bsent the no-duty-to-warn instruction, the jury could have found respondent's exercise of reasonable care included shouting a warning to appellant or attempting to wave appellant back. Therefore, because the exercise of reasonable care upon the creation of a dangerous situation may include giving a warning to the at-risk party and in light of the jury's question, we are persuaded by

35. *Id.* at 446, 144 N.W.2d at 366.

36. *Id.* at 447, 144 N.W.2d at 367.

37. *Id.* (footnote omitted). The court of appeals in *Domagala* also cited illustration 3 from the Second Restatement, which seems factually similar to *Zylka*:

> A, carefully driving his truck, skids on an icy road, and his truck comes to rest in a position across the highway where he is unable to move it. *A fails to take any steps to warn approaching vehicles of the blocked highway.* B, driving his automobile with reasonable care, does not see the truck, skids on the ice and collides with it, and is injured. A is subject to liability to B.

Domagala, 787 N.W.2d at 673 (quoting Restatement (Second) of Torts § 321 cmt. a, illus. 3 (1965)).

> appellant's argument that the no-duty-to-warn and no-duty-to-protect instructions confused the negligence principles at issue here.[38]

It could be argued that Rolland was not negligent in creating the risk to Domagala at the outset but was negligent in failing to warn Domagala of the risk when he realized that Domagala could be injured, or that Rolland negligently created the risk at the outset. As in *Zylka*, it would seem to make little difference which view of the case was adopted.

Based on its reading of *Zylka*, the court of appeals was persuaded that "because the exercise of reasonable care upon the creation of a dangerous situation may include giving a warning to the at-risk party and in light of the jury's question [on warnings] . . . the no-duty-to-warn and no-duty-to-protect instructions confused the negligence principles at issue here."[39] Finally, the court held that the instructions were sufficiently prejudicial to justify granting a new trial to Domagala.[40]

V. *DOMAGALA* IN THE SUPREME COURT OF MINNESOTA

On appeal to the Minnesota Supreme Court, Rolland continued to maintain that there could be no duty to warn absent a special relationship.[41] Domagala abandoned the products-liability-by-analogy argument, but continued to maintain that a general duty of reasonable care existed because Rolland created a risk of injury, and that it was irrelevant (based on section 321 of the Restatement (Second) of Torts and *Zylka*) that Rolland may not have been negligent in creating the risk at the outset.[42]

The supreme court initially stated that "[t]his negligence case requires us to decide whether the failure to warn others of foreseeable harm created by the defendant's conduct can constitute negligence absent a special relationship between the parties."[43] The answer seems obvious. Of course a defendant who creates a foreseeable risk of harm has to exercise reasonable care

38. *Domagala*, 787 N.W.2d at 673.
39. *Id.*
40. *Id.* at 673–75.
41. Brief for Appellant at 13–17, Domagala v. Rolland, 805 N.W.2d 14 (Minn. 2011) (No. A09-1945), 2010 WL 8435272 at *13–17.
42. Brief for Respondent at 16–19, *Domagala*, 805 N.W.2d 14, 2011 WL 7415264 at *16–19.
43. *Domagala*, 805 N.W.2d at 18.

for the protection of a plaintiff who is exposed to that risk. Warning may constitute reasonable care. It is hornbook law.[44]

But getting to that conclusion required the supreme court to resolve the flawed syllogism at the core of Domagala's dilemma. Step one of the court's opinion was to determine whether Rolland owed a duty to Domagala.

It is clear that in nonfeasance cases a defendant owes no duty to the plaintiff absent a special relationship or some other exception to the general no duty rule.[45] If a defendant affirmatively creates a foreseeable risk of injury to another person, however, the defendant has a duty to use reasonable care for the protection of that person. Rolland's argument went beyond that by arguing that an earlier Minnesota Supreme Court case, *Harper v. Herman*,[46] controlled the outcome by preempting any argument that he had a duty to warn or protect the plaintiff.

The plaintiff in *Harper* was severely injured when he dived off a boat into shallow water. One of the issues was whether the boat operator, who was familiar with the area where the boat was anchored and knew that the water was dangerously shallow, had a duty to warn the plaintiff of the dangers of diving at that spot. The supreme court held that he did not:

> We have previously stated that an affirmative duty to act only arises when a special relationship exists between the parties. "The fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action . . . unless a special relationship exists . . . between the actor and the other which gives the other the right to protection."[47]

44. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS § 227 (2000).

45. *Id.* § 314. Section 37 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm provides that "[a]n actor whose conduct has not created a risk of physical . . . harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in §§ 38–44 is applicable." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 37 (Proposed Final Draft No. 1, 2005). Sections 40 and 41 are the special relationship sections.

46. 499 N.W.2d 472 (Minn. 1993).

47. *Id.* at 474 (quoting Delgado v. Lohmar, 289 N.W.2d 479, 483 (Minn. 1979)). It could be argued that Herman did in fact create a risk by mooring his boat in shallow water where there was a risk to divers without telling people in the boat that it was risky. There would have been no issue concerning Herman's duty had the court read it that way, but it did not.

The court in *Harper* cited its opinion in *Delgado v. Lohmar*[48] for the proposition that even where a person realizes that he or she must take action to avoid injury to another, a special relationship is required before a duty to act will be imposed. *Delgado*, like *Harper*, was a nonfeasance case. The problem arose because Rolland argued that *Harper* should be construed to mean that while there is a duty to warn in special relationship cases, there is no duty to warn absent a special relationship.

The supreme court in *Domagala* broke the duty analysis into two parts. The first part covered the duty to warn. The supreme court saw the case as a request "to formally recognize and clarify the distinction between the specific duty to warn that arises when the parties stand in a special relationship and the duty to warn that constitutes an exercise of the general duty of reasonable care."[49]

In its opening analysis of the issue, the supreme court recognized the standard common law distinction between misfeasance and nonfeasance, observing that "[t]he distinction between the specific duty to warn and exercising reasonable care by giving a warning likely stems from the historical divergence of liability for misfeasance and nonfeasance."[50]

The court saw the duty to act with reasonable care for the protection of others implicated in two ways in *Domagala*:

> First, echoing the principles of liability for misfeasance, general negligence law imposes a general duty of reasonable care when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff. . . .
>
> Second, a defendant owes a duty to protect a plaintiff when action by someone other than the defendant creates a foreseeable risk of harm to the plaintiff and the defendant and plaintiff stand in a special relationship.[51]

In making the distinction, the court had to resolve Rolland's *Harper* argument. In doing so, the supreme court first referenced *Harper*'s partial quotation of *Delgado*:

> We have previously stated that an affirmative duty to act only arises when a special relationship exists between the parties. "The fact that an actor realizes or should realize

48. 289 N.W.2d 479 (Minn. 1979).
49. Domagala v. Rolland, 805 N.W.2d 14, 22 (Minn. 2011).
50. *Id.*
51. *Id.* at 23 (citation omitted).

> that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action . . . unless a special relationship exists . . . between the actor and the other which gives the other the right to protection."[52]

The court then got to the core of the problem presented by Rolland's *Harper* argument:

> But to hold that *Harper* prohibits a breach of the duty of reasonable care based on a failure to warn, in addition to the imposition of a specific duty to warn absent a special relationship, would require us to read *Harper* out of context and apply its holding too broadly. A correct application of our analysis in *Harper* must be mindful of the historical distinction between misfeasance stemming from an actor's own conduct and nonfeasance when someone other than the defendant creates the harm.[53]

Of course! Rolland's construction of *Harper* is overbroad, given any reading of the case, but the supreme court in *Domagala* thought that *Harper*'s quotation from *Delgado,* which it characterized as the court's "seminal special relationship case,"[54] was incomplete. As the court in *Domagala* noted,[55] the *full* quote from *Delgado* reads as follows:

> The fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action. *Ordinarily, there is no duty to control the conduct of a third person to prevent him from causing physical harm to another* unless a special relationship exists, either between the actor and the third person which imposes a duty to control, or between the actor and the other which gives the other the right to protection.[56]

In distancing *Harper*'s facts from the facts in its case, the *Domagala* court emphasized that in *Harper*, the defendant boat-owner did not create the risk of injury to the plaintiff. Rather, the plaintiff created the risk in diving into water of an unknown depth. In light of those facts, the court revised *Harper* to stand for the proposition

52. *Id.* at 24 (quoting *Harper*, 499 N.W.2d at 474 (alterations in original) (quoting *Delgado,* 289 N.W.2d at 483)).
53. *Id.*
54. *Id.*
55. *Id.*
56. *Delgado*, 289 N.W.2d at 483 (emphasis added) (citations omitted).

"that 'an affirmative duty to act [to warn plaintiffs of harm created by someone other than the defendant] only arises when a special relationship exists between the parties.'"[57]

Thus, clarified by the supreme court, *Harper* stands for the proposition that a duty to warn in cases involving risks created by third persons exists only if there is a special relationship between the plaintiff and defendant. It is obvious, then, that it has no application in *Domagala*, where the risk of injury was not created by a third person. The syllogism is busted.

Having put *Harper* aside, the court considered the second step in its duty analysis: whether Rolland owed Domagala a general duty of reasonable care. The district court and court of appeals applied section 321 of the Restatement (Second) of Torts to the issue.[58] Section 321 provides:

> (1) If the actor does an act, and subsequently realizes or should realize that it has created an unreasonable risk of causing physical harm to another, he is under a duty to exercise reasonable care to prevent the risk from taking effect.
>
> (2) The rule stated in Subsection (1) applies even though at the time of the act the actor has no reason to believe that it will involve such a risk.[59]

Comment a of section 321 states that the rule applies "whenever the actor realizes or should realize that his act has created a condition which involves an unreasonable risk of harm to another, or is leading to consequences which involve such a risk . . . whether the original act is tortious or innocent."[60] In explaining how section 321 works, the court of appeals referred to the first and third illustrations in comment a:

> 1. A is playing golf. He sees no one on or near a putting green and drives to it. While the ball is in the air, B, another player, suddenly appears from a bunker directly in the line of A's drive. A is under a duty to shout a warning to B.
>
> . . . .

57. *Domagala*, 805 N.W.2d at 24 (alteration in original) (quoting *Harper*, 499 N.W.2d at 474).

58. Domagala v. Rolland, 787 N.W.2d 662, 672 (Minn. Ct. App. 2010).

59. RESTATEMENT (SECOND) OF TORTS § 321 (1965).

60. *Id.* § 321 cmt. a.

> 3. A, carefully driving his truck, skids on an icy road, and his truck comes to rest in a position across the highway where he is unable to move it. A fails to take any steps to warn approaching vehicles of the blocked highway. B, driving his automobile with reasonable care, does not see the truck, skids on the ice and collides with it, and is injured. A is subject to liability to B.[61]

As the illustrations demonstrate, a person who creates a risk of injury, even if not negligently, is subject to liability for failure to warn another who may be injured because of the person's conduct.

The supreme court was uneasy with the principle adopted in section 321. The court stated that section 321 has been heavily criticized in multiple jurisdictions because of the vagueness and over-inclusiveness of the section, the lack of a clearly defined standard, and its failure to address policy concerns.[62] Ultimately, the court stated that

> [b]ecause it is not necessary to adopt section 321 to recognize the duty imposed on Rolland or to resolve the issues before us, and because of the significant public policy concerns surrounding section 321, we decline at this time to adopt Restatement (Second) of Torts § 321 as a basis for imposing a duty of care in a negligence claim.[63]

Somewhat ironically, the Reporter's Note to section 321 states that the first illustration was based upon the Minnesota Supreme Court's decision in *Hollinbeck v. Downey*,[64] a golfing accident case in which the defendant hit a ball on a practice fairway, endangering a caddy who was on that fairway shagging golf balls for another

61. *Id.* § 321 cmt. a, illus. 1, 3. Illustration 2 reads as follows:

> A, reasonably believing his automobile to be in good order, lends it to B to use on the following day. The same night A's chauffeur tells him that the steering gear is in dangerously bad condition. A could readily telephone B and warn him of the defective steering gear but neglects to do so. B drives the car the following day, the steering gear breaks and the car gets out of control, causing a collision with the car of C in which B and C are hurt. A is subject to liability to B and C.

Id. § 321 cmt. a, illus. 2.

62. *Domagala*, 805 N.W.2d at 25. In contrast, the Reporters' Note to section 39 of the Restatement (Third) of Torts, which supersedes sections 321 and 322 of the Restatement (Second) of Torts, states that "[t]he principle expressed in §§ 321–322 of the Second Restatement of Torts has been widely accepted and applied in the courts . . . ." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 39, Reporters' Note, cmt. d (Proposed Final Draft No. 1 2005).

63. *Domagala*, 805 N.W.2d at 26.

64. 261 Minn. 481, 113 N.W.2d 9 (1962).

player. The presence of the inexperienced fourteen-and-one-half-year-old plaintiff, combined with Downey's lack of skill, created some risk of injury to the plaintiff. When Downey, and the golf professional who was instructing him, realized the caddie was in the path of the ball Downey hit, they yelled "fore," but it was too late. The court held that Downey owed the plaintiff a duty under the circumstances:

> If Downey knew, or in the exercise of ordinary care should have known, that plaintiff was in a zone of danger and was unaware of Downey's intention to hit, Downey should have given him a warning or desisted from striking the ball until plaintiff was in a place of safety. It is our opinion that it was a question for the jury to pass upon.[65]

The Minnesota Supreme Court, commenting on *Hollinbeck* in *Grisim v. TapeMark Charity Pro-Am Golf Tournament*,[66] stated that if defendant Downey "knew, or in the exercise of ordinary care should have known, that plaintiff was in a zone of danger and was unaware of Downey's intention to hit, Downey should have given [plaintiff] a warning."[67] The supreme court in *Domagala* did cite *Hollinbeck*, but as an example of a case in which a defendant owed a duty to the plaintiff because the defendant created a foreseeable risk of injury.[68]

It would have been equally easy for the supreme court in *Domagala* to conclude that it had previously recognized section 321's principle in *Hollinbeck*, and that *Hollinbeck* had in fact provided partial authority for section 321. The court would have noted the authorities adopting section 321, and in distinguishing the authorities rejecting it, conclude that where courts had refused to adopt section 321, they may have done so for reasons of principle or policy that were inapplicable on the facts in *Domagala*. That is not the route the court took, however.

Having concluded that section 321 could not provide the basis for imposing a duty on the defendant, the court noted that "a duty can be imposed under other general negligence principles found in common law."[69] In a mix-and-match, the court set out varying approaches to the duty question. The court first observed that:

65. *Id.* at 486, 113 N.W.2d at 12–13.

66. 415 N.W.2d 874, 876 (Minn. 1987) (quoting *Hollinbeck*, 261 Minn. at 486, 113 N.W.2d at 12–13).

67. *Id.*

68. *Domagala*, 805 N.W.2d at 26.

69. *Id.*

> Under common law principles, courts generally have considered the following factors when determining whether a defendant owed a duty of care: (1) the foreseeability of harm to the plaintiff, (2) the connection between the defendant's conduct and the injury suffered, (3) the moral blame attached to the defendant's conduct, (4) the policy of preventing future harm, and (5) the burden to the defendant and community of imposing a duty to exercise care with resulting liability for breach.[70]

A multi-factor approach has been adopted in most states, including those noted by the court in *Domagala*, although there are numerous variations.[71]

Then, in apparent contrast, the supreme court set out the Minnesota approach to duty:

> In Minnesota, the duty to exercise reasonable care arises from the probability or foreseeability of injury to the plaintiff. In other words, when a person acts in some manner that creates a foreseeable risk of injury to another, the actor is charged with an affirmative duty to exercise reasonable care to prevent his conduct from harming others. To determine whether risk of injury from the defendant's conduct is foreseeable we "look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility."[72]

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70. *Id.*

71. *See* W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1878 (2011). The most common factors include:

> (1) the foreseeability of harm to the plaintiff, (2) the degree of certainty that the plaintiff suffered injury, (3) the closeness of the connection between the defendant's conduct and the injury suffered, (4) the moral blame attached to the defendant's conduct, (5) the policy of preventing future harm, (6) the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and (7) the availability, cost, and prevalence of insurance for the risk involved.

Id. Cardi notes that the formulation is drawn from the California Supreme Court's decisions in *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968) and *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1958). *Id.* While the treatise cited by the court in *Domagala* notes that the five-factor approach is the approach generally taken in deciding duty issues, Cardi notes that the California Supreme Court approach is actually a minority approach to the issue. Cardi, *supra*, at 1882–83; *see also Domagala*, 805 N.W.2d 14. Cardi notes that courts have considered no less than forty-two factors that are relevant to the duty determination. Cardi, *supra*, at 1882–83.

72. *Domagala*, 805 N.W.2d at 26 (citations omitted) (quoting Foss v. Kincade,

The last part of the duty determination comes from *Foss v. Kincade*,[73] which cited the supreme court's decision in *Whiteford v. Yamaha Motor Corp., U.S.A.*[74] The statement that the "specific danger" must have been "objectively reasonable to expect" was adopted by the supreme court in 1998, but it was not based on any prior Minnesota Supreme Court opinion. Instead, it was drawn from an older Missouri Supreme Court opinion that did not exactly say that.[75] The restrictive foreseeable risk formulation has been repeatedly cited by the appellate courts in Minnesota.[76]

A few paragraphs later, however, the court said that the test for duty "is not whether the precise nature and manner of the plaintiff's injury was foreseeable, but whether 'the possibility of an accident was clear to the person of ordinary prudence.'"[77] The court went on to state the settled proposition that it has "imposed a duty of reasonable care to prevent foreseeable harm when the defendant's conduct creates a dangerous situation."[78]

The duty formulations vary. Putting aside the policy factors, the key variance is the test to determine whether a risk of injury is foreseeable. Which formulation is used—the more specific statement from *Whiteford* versus the more general statement in *Zylka v. Leikvoll*[79]—could be outcome-determinative in a given case. A court that is inclined to conclude that a risk is unforeseeable may use the narrower, more restrictive standard from *Whiteford* to justify its conclusion. A court inclined to conclude that the risk is either foreseeable as a matter of law or in dispute may rely on the broader standard.[80]

766 N.W.2d 317, 322 (Minn. 2009)).

73. 766 N.W.2d at 322.

74. 582 N.W.2d 916, 918 (Minn. 1998).

75. *See* Mike Steenson, *Minnesota Negligence Law and the Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, 37 WM. MITCHELL L. REV. 1055, 1101–02 (2011).

76. *See, e.g.*, Stuedemann v. Nose, 713 N.W.2d 79, 84 (Minn. Ct. App. 2006); Laska v. Anoka Cnty., 696 N.W.2d 133, 140 (Minn. Ct. App. 2005); Kuhl v. Heinen, 672 N.W.2d 590, 593 (Minn. Ct. App. 2003).

77. *Domagala*, 805 N.W.2d at 27 (quoting Connolly v. Nicollet Hotel, 254 Minn. 373, 382, 95 N.W.2d 657, 664 (1959)). The citation to *Connolly* seems to bring the court closer to its more traditional statement of when duty arises.

78. *Id.* at 26. The court's cases taking that position date back more than one hundred years. *See, e.g.*, Christianson v. Chicago, St. P., M. & O. Ry. Co., 67 Minn. 94, 97, 69 N.W. 640, 641 (1896); Schubert v. J. R. Clark Co., 49 Minn. 331, 51 N.W. 1103 (1892).

79. 274 Minn. 435, 447, 144 N.W.2d 358, 367 (1966).

80. This is not intended to denigrate the decision-making process. The key

A. Duty, Foreseeability, and the Judge/Jury Relationship

The supreme court reiterated its standard position that foreseeability "is a threshold issue related to duty[81] that is ordinarily 'properly decided by the court prior to submitting the case to the jury,'"[82] although in close cases it is a jury issue.[83] Then, "[b]ecause the parties do not allege, and the record does not suggest, that this case presents a close question of foreseeability,"[84] the court reviewed the foreseeability issue *de novo*, asking whether, in looking at the defendant's conduct, "it was objectively reasonable to expect the specific danger causing the plaintiff's injury."[85]

In a footnote that continued the discussion on the judge/jury relationship with respect to the foreseeability issue,[86] the court commented on its 2009 opinion in *Foss v. Kincade*.[87] The court in *Domagala* stated that *Foss* accurately said that "foreseeability of harm can be decided by the court as a matter of law when the issue is clear," but that the court in *Foss* suggested without explaining that "in most cases the question of foreseeability is an issue for the jury."[88] The court's concern with *Foss* demonstrates a recurring problem in Minnesota negligence cases regarding the judge/jury relationship with respect to duty and foreseeability.

The courts sometimes say that because duty is a question of law for the court, foreseeability as a threshold issue is more properly decided by the courts, and sometimes the courts say that the foreseeability issue should be decided by the court as a matter of law when the issue is clear. Then there is the statement in *Foss* that the foreseeability issue is a question for the jury in most cases, a statement rejected by the court in *Domagala* as without foundation.

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is whether a decision departs from decision-making norms. *See* John E. Simonett, *The Use of the Term "Result-Oriented" to Characterize Appellate Decisions*, 10 WM. MITCHELL L. REV. 187, 209 (1984). Using variant standards to resolve duty issues, while perhaps inconsistent, is not result-oriented in the pejorative sense.

81. Boone v. Martinez, 567 N.W.2d 508, 510 (Minn. 1997); Cooney v. Hooks, 535 N.W.2d 609, 612 (Minn. 1995) (citing Alholm v. Wilt, 394 N.W.2d 488, 491 n.5 (Minn. 1986)).

82. *Domagala*, 805 N.W.2d at 27 (quoting *Alholm*, 394 N.W.2d at 491 n.5).

83. *Id.* (citing Whiteford v. Yamaha Motor Corp., U.S.A., 582 N.W.2d 916, 918 (Minn. 1998)).

84. *Id.*

85. *Id.*

86. *Id.* at 27 n.3.

87. 766 N.W.2d 317, 322–23 (Minn. 2009).

88. *Domagala*, 805 N.W.2d at 27 n.3 (quoting *Foss*, 766 N.W.2d at 322–23).

Alholm v. Wilt[89] was cited by the court in *Domagala* for the proposition that foreseeability is a threshold issue more properly decided by the court before the case is submitted to the jury. But as a preface, the court in *Alholm*, in footnote dictum, also stated that it was troubled by the practice of submitting foreseeability to the jury.[90]

A trial court following the supreme court's guidelines will initially have to consider foreseeability in deciding whether the defendant owed a duty to the plaintiff. Putting aside the variance in the foreseeability standards, a trial court may decide that the risk

89. 394 N.W.2d 488, 491 n.5 (Minn. 1986).

90. The trial court in *Alholm* instructed the jury as follows:

> The defendant is required to use reasonable care in the operation of his business. The defendant-proprietor may be involved in what is called negligence. The elements necessary to prove an innkeeper's liability under negligence are as follows:
>
> 1st. The proprietor must be put on notice of the offending party's viscous [sic] or dangerous propensities by some act or threat.
>
> 2nd. The proprietor must have an adequate opportunity to protect the injured patron.
>
> 3rd. The proprietor must fail to take reasonable steps to protect the injured patron.
>
> 4th. The injury must be foreseeable [sic].

Id. at 489 n.3 (alteration in original). The supreme court was responding to the trial court's inclusion of foreseeability in its instruction, as pointed out in a later footnote questioning the practice:

> Although not raised on this appeal, we are troubled by the practice of placing foreseeability within the jury's domain. The foreseeability issue, as a threshold issue, is more properly decided by the court prior to submitting the case to the jury. If the trial court concludes that the innkeeper did not have notice of the person's dangerous propensities, then it must find that the injury would not have been foreseeable to a reasonable innkeeper and thus, no duty to protect arose.
>
> Because foreseeability has nothing to do with proximate cause, we do not believe that the jury should be instructed on the issue. *See, e.g.*, Prosser & Keaton on Torts § 43 at 280–81 (5th ed. 1984). To the extent our prior case law speaks of "foreseeability" as an element of the cause of action, we were only discussing foreseeability in the context of whether a legal duty arises, not as something on which the jury should be instructed.

Id. at 491 n.5. The court's statement that foreseeability should not be part of the instruction seems to be based on its conclusion, at least initially, that foreseeability has nothing to do with proximate cause. Later Minnesota cases have blurred that line by taking the position that foreseeability is central to the proximate cause determination. *See* Lietz v. N. States Power Co., 718 N.W.2d 865, 872 (Minn. 2006); Canada v. McCarthy, 567 N.W.2d 496, 506 (Minn. 1997). The last sentence of footnote 5 then connects foreseeability with duty, again stating that it is not something on which a jury should be instructed, but without stating why. *Alholm,* 394 N.W.2d at 491 n.5.

is clearly (not a close question) foreseeable or that it is not. Following the guidelines, a trial court finding that the risk is clearly foreseeable would then submit the negligence (breach) issue to the jury. This is where the potential confusion arises. If the trial court has decided that there is a duty because the defendant created a risk of foreseeable harm, and if *Alholm* is correct in stating that the foreseeability issue should not be submitted to the jury, the next question is how the case *should* be submitted to the jury. If the trial judge instructed on the basis of the pattern negligence instruction,[91] the jury would be asked to determine whether the defendant exercised reasonable care under the circumstances.

That deliberation could include consideration of whether the risk to the plaintiff was foreseeable. The pattern instruction does not specifically include foreseeability as a factor relevant to the breach determination, as do some pattern instructions.[92] But nothing would preclude its consideration, unless resolving the foreseeability issue as a matter of law means that there can be no jury consideration of the issue or, perhaps, that the jury should be instructed as a matter of law that the risk of injury created by the defendant was foreseeable. That seems unlikely.

If the trial court determines that there is a close question concerning foreseeability, the issue would then be for the jury. In

91. *See* 4 STEENSON & KNAPP, *supra* note 7, § 25.10.

92. California's pattern instruction, COMM. ON CAL. CIVIL JURY INSTRUCTIONS, CALIFORNIA JURY INSTRUCTIONS—CIV. 3.11 (2012), reads as follows:

> One test that is helpful in determining whether a person was negligent is to ask and answer the question whether or not, if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, [he] [or] [she] would have foreseen or anticipated that someone might have been injured by or as a result of [his] [or] [her] action or inaction. If the answer to that question is "yes," and if the action or inaction reasonably could have been avoided, then not to avoid it would be negligence.

New Mexico's uniform jury instruction on negligence reads as follows:

> The term "negligence" may relate either to an act or a failure to act.
>
> An act, to be "negligence," must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to [himself] [herself] or to another and which such a person, in the exercise of ordinary care, would not do.
>
> A failure to act, to be "negligence," must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to [himself] [herself] or to another.

N.M. R. ANN., CIVIL, UJI 13-1601 (West, Westlaw through Amendments Dec. 1, 2012).

that event, there are two possibilities for submission of the case to the jury: either the pattern instruction on negligence could be used, or the jury could be specifically asked to determine whether the injury was foreseeable as a predicate to its consideration of the negligence issue. If the jury is asked specifically to determine whether the risk was foreseeable, the issue then arises as to which of the varying standards the supreme court has set out should be used to determine when a risk is foreseeable. The choice could be outcome-determinative.

If the pattern instruction is used, the approach (at least as far as jury instructions are concerned) would be the same whether the court determined as a matter of law that the risk was foreseeable enough to find a duty, or that the foreseeability issue was close enough to submit the case to the jury. The jury's job would not change; the jury would have to determine whether the defendant was negligent under the circumstances.

If foreseeability is disputed (the close case), however, it may be that the supreme court intends that the disputed foreseeability issue be resolved by the jury. If so, the logical approach would be to ask the jury whether the injury or risk was foreseeable to the defendant. If the answer is yes, the jury would proceed to determine whether the defendant was negligent in light of the foreseeable risk. A no answer to the foreseeability issue would end the jury's inquiry.

B. Domagala*'s Duty Determination—The Reasonable Care Requirement*

In *Domagala*, the supreme court concluded "that a reasonable person could expect that forcefully shaking a bucket attachment that was hanging vertically from a skid loader by one pin could cause injury to those in proximity to the skid loader" and that Rolland therefore "owed a duty to act with reasonable care to prevent injury to others as a result of his conduct."[93] Under the circumstances, that conclusion could perhaps satisfy either the *Whiteford* or *Zylka* standards, but the court may have applied a third, more general standard—whether a reasonable person could have anticipated a risk of injury under the circumstances.

The next step for the court was to determine "whether the general duty of reasonable care can include giving a warning as an

93. *Domagala*, 805 N.W.2d at 27–28.

exercise of reasonable care."[94] The court cited its decision in *Hanson v. Christensen*[95] for the proposition that care has to be exercised commensurate with the risk, and a series of cases to establish the proposition that the duty to use reasonable care can be satisfied in a variety of ways, including warning of potential dangers.[96] The reasonable care issue is typically for the jury.[97]

The court then cemented its position on warnings:

> In fact, the jury is specifically instructed to consider how a reasonable person would react in a similar circumstance

94. *Id.* at 28.

95. 275 Minn. 204, 205, 145 N.W.2d 868, 870 (1966). That is a prosaic proposition noted in numerous cases. *Hanson* was a case involving the duty of a proprietor of a place of public amusement, as were many other similar cases, but the concept is not so limited. *See, e.g.*, Glorvigen v. Cirrus Design Corp., 816 N.W.2d 572, 582 (Minn. 2012) (holding that product supplier must exercise reasonable care commensurate with reasonably foreseeable risks); Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 912 (Minn. 1983) (landlord's duty in negligent hiring case); Ferguson v. N. States Power Co., 307 Minn. 26, 33, 239 N.W.2d 190, 194 (1976) (duty of power company); Martin v. N. States Power Co., 245 Minn. 454, 463, 72 N.W.2d 867, 872 (1955) (duty of power company); Hartmon v. Nat'l Heater Co., 240 Minn. 264, 272, 60 N.W.2d 804, 810 (1953) (products liability—duty of manufacturer); Goar v. Vill. of Stephen, 157 Minn. 228, 233, 196 N.W. 171, 173 (1923) (holding that it was the duty of village responsible for power lines to exercise reasonable care commensurate with the dangers involving high-voltage lines); Walker v. Holbrook, 130 Minn. 106, 110, 153 N.W. 305, 306 (1915) (medical malpractice); Fay v. Chicago, St. P., M. & O. Ry. Co., 72 Minn. 192, 193, 75 N.W. 15, 16 (1898) (holding that it was the duty of railroad to exercise reasonable care commensurate with risks).

96. *See Domagala*, 805 N.W.2d at 28 (citing Delgado v. Lohmar, 289 N.W.2d 479, 484 (Minn. 1979)); Ferguson v. Benson, 309 Minn. 160, 166–67, 244 N.W.2d 116, 119–20 (1976); Zylka v. Leikvoll, 274 Minn. 435, 449, 144 N.W.2d 358, 367–68 (1966). The supreme court has noted that the duty to use reasonable care includes an obligation to warn in numerous disparate cases. *See, e.g.*, Schroeder v. St. Louis Cnty., 708 N.W.2d 497, 511 (Minn. 2006) (Hanson, J., concurring and dissenting) (describing county's duty to warn of dangerous road conditions); Olmanson v. LeSueur Cnty., 693 N.W.2d 876, 881 (Minn. 2005) (holding that county as property owner had duty to warn entrants of dangerous conditions); Steinke v. City of Andover, 525 N.W.2d 173, 177 (Minn. 1994) (describing landowner's duty to use reasonable care to warn trespassers of artificial hidden, dangerous conditions); Parks v. Allis-Chalmers Corp., 289 N.W.2d 456, 460 (Minn. 1979) (holding that product manufacturer has duty to use reasonable care to warn of dangers inherent in use of product); Adee v. Evanson, 281 N.W.2d 177, 179–80 (Minn. 1979) (describing landowner's duty to entrant to use reasonable care to warn of obvious dangers if landowner could anticipate injury notwithstanding the obviousness of the danger); Mix v. City of Minneapolis, 219 Minn. 389, 395, 18 N.W.2d 130, 134 (1945) (holding that municipality owes a duty to use reasonable care to warn or otherwise protect travelers from dangerous conditions such as pitfalls or traps).

97. *Domagala*, 805 N.W.2d at 29.

> and to find the defendant liable for negligence if the defendant failed to act as a reasonable person would. A jury should be free to consider whether a reasonable person in circumstances similar to the defendant would warn others of foreseeable injury. Therefore, *we hold that when a defendant owes a plaintiff a duty of reasonable care, the defendant may exercise reasonable care by warning the plaintiff of impending harm.*[98]

The holding seems to suggest that the burden of proof or the burden of going forward in a negligence case is the defendant's. While a defendant may owe the plaintiff a duty of reasonable care, however, the plaintiff still bears the burden of proving that the defendant failed to exercise reasonable care by the greater weight of the evidence. One way for the plaintiff to do that is to show that the defendant should have warned the plaintiff of the risk of injury. Even if there is no warning, a jury may find that none was necessary and that the defendant was not negligent for failure to warn the plaintiff of the danger. The italicized statement quoted above could be recast to state that *when a defendant owes a plaintiff a duty of reasonable care, the plaintiff may establish that the defendant breached that duty by failing to warn the plaintiff of impending harm.*

In a footnote immediately following these holdings on the warning issue, the supreme court reiterated Rolland's argument that permitting the jury to consider whether a reasonable person in Rolland's position would have warned Domagala of the danger of approaching the skid loader circumvents the requirement for imposing a specific duty to warn in a negligence case—specifically the existence of a special relationship and foreseeable harm.[99]

The court conceded that in the instant case Rolland "may be correct because, on remand, Domagala may argue to the jury that Rolland breached his duty of reasonable care by failing to warn Domagala of the bucket's precarious position," but noted that "the key difference between imposing a specific duty to warn under our special relationship jurisprudence and our holding today is evident in the element of breach."[100] The distinction, the court explained, is that "[i]f Rolland owed a specific legal duty to warn Domagala, failure to issue a warning could constitute a breach as a matter of

98. *Id.* (emphasis added) (citations omitted).
99. *Id.* at 29 n.4.
100. *Id.*

law."[101] However, in the next sentence the court noted that "the duty of reasonable care may be satisfied in other ways."[102] And then:

> Because we hold that a defendant may breach the general duty of reasonable care by failing to give a warning, a jury is free to find that a defendant who failed to warn of impending harm was not negligent because the defendant acted in some other manner that mitigated the risk of harm to others.[103]

This analysis seems to clarify the burden of proof, at least in part, but it raises two other issues. It seems clear that a plaintiff may establish negligence by proving a negligent failure to warn. The defendant may establish that he took measures to otherwise minimize the risk of injury, including, perhaps, removing the source of the injury. But even if the plaintiff establishes that the defendant did not warn, and presents no other evidence, the jury should be free to find that failure to warn was simply not negligent under the circumstances, even if the defendant did not present evidence that he or she minimized the risk in some other way.

The second problem is that the statement somewhat muddies the distinction as to the impact of general versus specific duties to warn. The footnote seems to suggest that if there is a special duty to warn, failure to give a warning could effectively constitute negligence as a matter of law, whereas in a case involving a general duty to warn it would not because the defendant may have "acted in some other manner that mitigated the risk of harm to others."[104]

While that *could* be the case, it is certainly not *always* the case. The facts in *Harper* provide a good example, if they are altered to assume the existence of a special duty.[105] Assuming the existence of a special duty, there would be two ways to look at the case. One is that given the existence of a special relationship between Harper and Herman, Herman had a duty to warn. He failed to do so and therefore is liable as a matter of law. In the alternative, the special relationship imposed a duty to warn, but it would be for the jury to determine whether Herman was in fact negligent in failing to warn Harper of the dangers of a dive into shallow water. A jury could

101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *See supra* notes 46–47 and accompanying text.

readily conclude that Herman was not negligent—perhaps because it thought that the danger was obvious enough or should have been obvious enough to Harper that Herman was not negligent in failing to warn.

Warning is one way of satisfying a duty to use reasonable care. The Restatement (Third) of Torts sections dealing with special relationships illustrate how it works. Section 40 states that "[a]n actor in a special relationship with another owes the other a duty of reasonable care with regard to risks that arise within the scope of the relationship."[106] There is no automatic duty to warn. Failure to warn is simply one way of establishing the breach, but not the only way, and failure to warn does not mean either automatic liability or that if there is a failure to warn that the defendant has to engage in some sort of "make-up" conduct to fill the void. While the court may determine that there is a duty to use reasonable care, a trier of fact could well conclude that the defendant was simply not negligent.

The problem is in assuming that a duty to warn flows automatically from a finding of a special relationship, or if there is a general duty to warn, that the defendant has to engage in some other conduct to ameliorate the risk if the defendant did not warn the plaintiff of that risk. Even in cases where the law seems to dictate a warning obligation, however, absence of a warning does not mean that liability is automatic. For example, products liability theory presumes the existence of a duty to warn of foreseeable dangers created by a product.[107] But even if there is a *duty* to warn, the issue of whether a product manufacturer was negligent for failing to warn is a *breach* issue, which could be resolved either way by the trier of fact. Deciding whether a manufacturer should have warned against a particular danger or whether the warnings given were adequate will turn on whether the manufacturer exercised reasonable care under the circumstances.[108]

106. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40(a) (2010).

107. *See* Gray v. Badger Mining Corp., 676 N.W.2d 268, 274 (Minn. 2004).

108. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1998); 4A Michael K. Steenson & Peter B. Knapp, MINNESOTA PRACTICE: JURY INSTRUCTION GUIDES - CIVIL, § 75.25 (5th ed. 2006).

C. The Supreme Court's Conclusion

In the second part of its opinion, the supreme court held that the district court abused its discretion in giving the no-duty-to-protect and no-duty-to-warn instructions.

The district court instructed the jury that one has a duty to act for the protection of another person "only if there is a special relationship between the parties and the risk is foreseeable," but that no special relationship existed in the case and that the jury should not consider such a duty in its deliberation in the case.[109]

The supreme court said that a correct statement of the law would read as follows:

> A person generally has no duty to act for the protection of another person *when the harm was created by a third party* [(the supreme court's reframing of *Harper v. Herman*)]. No duty to protect *against harms created by others* exists in this matter and you must not consider such a duty in your deliberation in this case.[110]

Without that limiting language, the court said, a jury could conclude that Rolland owed no duty to Domagala, which would violate a basic principle of negligence law—that when a person creates a foreseeable risk of injury to another, an affirmative duty to exercise reasonable care to avoid causing injury to that person exists.[111]

It is not clear whether the supreme court meant that its clarifying statement would be an appropriate substitute jury instruction, or only that the district court should have more accurately stated that there is generally no duty to guard against harms created by a third party. Given the fact that such an instruction would seem to provide a jury with unnecessary and potentially confusing information, particularly the part concerning risks created by a third party, it seems more likely that the court simply intended to clarify the law without suggesting the general appropriateness of such an instruction.

The supreme court also held that the district court erred in giving the duty to warn instruction. That instruction first told the jury that special relationships giving rise to a duty to warn exist only for common carriers, innkeepers, possessors of land holding it

109. *Domagala*, 805 N.W.2d at 30.
110. *Id.* (quoting Bjerke v. Johnson, 742 N.W.2d 660, 664 (Minn. 2007)).
111. *Id.*

open to the public, and persons who have custody of others under circumstances where the other is deprived of normal opportunities for self-protection. Then, because the district court had ruled as a matter of law that there was no duty to warn, the jury was instructed that it should not consider any duty to warn in their deliberations.[112]

The supreme court concluded that the first part of the district court's instruction listing the special relationships that give rise to a duty to warn was not a material misstatement of the law, but that the instruction was unnecessary and was also confusing and misleading given that the parties agreed that there was no special relationship.[113] The instruction was also in conflict with the supreme court's holding "that a defendant who owes a duty of reasonable care may satisfy that duty by warning foreseeable plaintiffs of impending danger."[114] The instruction was inaccurate in foreclosing any consideration of a duty to warn and breach for failure to do so.[115] The court held that the instructions were at best misleading on the duty and breach issues and were prejudicial. The court therefore affirmed the court of appeals and remanded the case to the district court for a new trial.[116]

VI. LESSONS FROM *DOMAGALA*?

The supreme court covered considerable territory in traversing negligence law in *Domagala*. There are several lessons that can be drawn from the case.

1. The supreme court clearly rejected the argument that there has to be a special relationship between the defendant and plaintiff in order for the defendant to have a duty to warn or protect the plaintiff. *Harper v. Herman* does *not* stand for the proposition that a duty to warn exists only if there is a special relationship.
2. That means that there should be no possibility that the *Domagala* dilemma will be repeated in cases where the court determines that a defendant has acted affirmatively in creating a foreseeable risk of injury. A determination that the defendant owes a duty to the plaintiff should preclude any jury

112. *Id.*
113. *Id.*
114. *Id.* at 31.
115. *Id.*
116. *Id.* at 31–32.

instructions qualifying the obligation of the defendant to use reasonable care under the circumstances.

3. The duty in negligence law is one of reasonable care under the circumstances. A duty to use reasonable care may arise when the defendant affirmatively creates a foreseeable risk of injury that imperils the plaintiff or where the defendant and plaintiff are in a special relationship.
4. Section 321 of the Restatement (Second) of Torts is not an appropriate basis for finding duty—at least at this time.
5. The preliminary legal wrangling over whether the case is one of misfeasance or nonfeasance, and what the correlative duty is under the circumstances, should not change from current law. The supreme court maintained the distinction between misfeasance and nonfeasance. Absent an exception, such as the special relationship exception, there is no duty to act in nonfeasance cases.

VII. QUESTIONS FROM *DOMAGALA*?

There are several remaining questions in the wake of the opinion and perhaps some red flags.

1. A defendant who is in a special relationship with the plaintiff owes a duty to the plaintiff to use reasonable care if the risks are foreseeable. While the supreme court in *Domagala* discussed special relationships in cases where a third person creates a risk of injury to the plaintiff, there are cases where a special relationship will trigger a duty of reasonable care where the risk arises for reasons other than the action or potential action of a third person. A simple example is the case where a special relationship exists between the plaintiff and defendant—as in the case of a patron who becomes physically ill at a restaurant—through no fault of the restaurant. The risk is not created by a third person, but the restaurant employees would have an obligation to aid the plaintiff because of the special relationship.[117] *Domagala*'s reformulation of *Harper v. Herman* will hopefully not be taken as the only case where special relationships may justify imposition of a duty of reasonable care.

117. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 40 cmt. f, illus. 1 (Tenative Draft No. 5, 2012).

2. The variance in the supreme court's discussion of the role of foreseeability in negligence law will create opportunities for potential confusion and inconsistency in application of the basic negligence standard. While foreseeable risk is a key to duty determinations under Minnesota law, it is not clear how specifically foreseeable or objectively foreseeable the risk has to be. The inconsistencies will remain absent a definitive decision establishing a set standard for resolving the issue.
3. If foreseeability is a central question in a case, and a court decides that it is a "close" case requiring jury resolution, that same variance foreseeability standard also raises a question as to how juries should be instructed on the issue. The narrower the standard (as in *Whiteford v. Yamaha Motor Corp., U.S.A.*), the more difficult the plaintiff's burden of establishing foreseeability will be.
4. In a nonfeasance case, the plaintiff will have to establish that there is a special relationship between plaintiff and defendant, or some other exception to the general no-duty rule. It is important to understand that if a duty exists because of a special relationship, the duty is simply one of reasonable care under the circumstances. The supreme court in *Domagala* seemed to suggest that a special relationship triggers an automatic obligation to warn, a burden the defendant could alleviate by showing that he took other precautions to lessen the risk to the plaintiff. That seems somewhat confusing. If, however, the existence of a special relationship simply means that the defendant has to use reasonable care for the plaintiff's safety, the jury would presumably resolve the breach issue according to the pattern jury instruction on negligence. The burden of proving negligence, whether through a failure to warn or otherwise, would remain the plaintiff's.

VIII. A SIMPLE CONCLUSION

Domagala v. Rolland is one of the supreme court's more detailed analyses of negligence law in recent years. It demonstrates the depth and weight of precedent in Minnesota law in resolving a case that was built on a premise that turned out to be false.[118]

118. Leon Green's observation over fifty years ago still seems relevant to the creation of *Domagala*'s dilemma:

> The confusion of tongues in the English and American tort law is so

Reduced to its basics, the case, along with Minnesota negligence law, might be reduced to some simple principles.

The first is that duty may be based on affirmative conduct that creates a risk of foreseeable injury or, in a nonfeasance case, on one of the exceptions to the usual no-duty rule, including where there is a special relationship. The issue of duty is a question for the court. Duty may sometimes turn on policy factors and it may sometimes turn on a court's conclusion that a particular risk is not foreseeable as a matter of law. Of course, a court's resolution of the foreseeability determination is really also a policy decision insofar as it reflects a conclusion that the risk of injury created by the defendant is just too remote.

When it comes to the role of foreseeability, the duty determination may be wrapped up in varying legal formulations, but there is no legal formula that gives an exact answer as to whether there will be a duty in a particular case. The fact-dependent nature of the inquiry guarantees that.[119] Of course,

> great that the tendency is quite marked for advocates both on and off the bench to seize upon an attractive statement in an opinion, sometimes out of context or beyond the factual and issuable basis of the decision, and create out of the statement some principle to soothe or annoy the profession for years to follow. Or it may be that some advocate or commentator hits upon a catchy phrase that is quickly taken up and made into a principle. These principles become the stock in trade for rationalization of decisions. It is rare that the environmental facts of a litigation, the decision of which is sought to be used as a precedent, are given adequate consideration. Many of the great decisions of the common law are rationalized on the basis of dicta or on the basis of statements made by judges in cases arising in wholly different contexts. The search never ends for some neat formula by which the adjudication of a controversy can be made easy and simple. Every tort lawyer is familiar with the formulas built around such terms as proximate, remote, reasonable, natural, direct, immediate, probable, foreseeable, and their numerous refinements. These and similar terms have had their day when their very mention was supposed to unlock the mysteries of some complex case and produce an incontrovertible result. They are embedded in our professional language and literature and will doubtless remain in our legal system to serve and to plague the profession as long as the common law is recognized as a means of settling disputes. It is most remarkable how from time to time they seem to gain new life and appear in a new garb.

Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1402–03 (1961) (citations omitted).

119. That is why the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 cmt. j (2010), purges foreseeability from the duty determination and places it in the breach determination. For a detailed look at the issue, see Steenson, supra note 75, at 1091–1108.

arguments may be made by analogy to other cases where the courts have found particular risks foreseeable, but rough equivalency of the facts does not guarantee a finding of duty. Each case stands on its own.

Negligence law would be somewhat simplified if the courts applied a consistent standard for determining whether a risk is foreseeable. Until the supreme court takes a position on which of the standards governs the foreseeability determination, the inconsistency will remain.

As far as the breach issue is concerned, it should not make any difference whether the duty exists by virtue of a special relationship between plaintiff and defendant and the existence of a foreseeable risk of injury, or because the defendant affirmatively created a foreseeable risk of injury to the plaintiff. The duty is one of reasonable care under the circumstances.[120]

If a court decides that there is a duty, the breach issue is typically for the jury, although a court may decide that the evidence of breach is insufficient to submit the case to the jury. If the trial court submits the breach issue to the jury, there is no need to detract from the jury's basic function—to determine whether the defendant (and plaintiff) exercised reasonable care under the circumstances—by loading the instructions with unnecessary statements extracted from appellate opinions that use language not intended to be used as jury instructions.[121]

Cases may be hard because of facts and proof. They should not be made harder by the law.

120. There may be some variances. In some cases the Minnesota Supreme Court has suggested or required that the jury determination on the breach issue may be guided by consideration of various factors. *See* Erickson v. Curtis Inv. Co., 447 N.W.2d 165, 169–70 (Minn. 1989); Peterson v. Balach, 294 Minn. 161, 174 n.7, 199 N.W.2d 639, 648 n.7 (1972).

121. *See* Vogel v. Nash-Finch Co., 196 Minn. 509, 516, 265 N.W. 350, 354 (1936) ("The arguments and tests used in judicial opinions, even though good law, are not written for the purpose of being used as instructions to a jury. The trial court, knowing the capacity of the jury, instructed relative to the same subject covered by the requested instruction very fully."). In *Alholm v. Wilt*, 394 N.W.2d 488, 491 (Minn.1986), the supreme court indicated it had "noted that it is neither appropriate nor good policy for trial courts to use texts of reported decisions of appellant courts because, when used out of context, such texts are sometimes misleading. *See, e.g.*, Hovey v. Wagoner, 287 Minn. 546, 548–49, 177 N.W.2d 796, 798 (1970)."